

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

June 20, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 94-3113**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

**IN THE INTEREST OF LASANDO L. R.,  
A CHILD UNDER THE AGE OF 18:**

**STATE OF WISCONSIN,**

**Petitioner-Respondent,**

**v.**

**LASANDO L. R.,**

**Respondent-Appellant.**

APPEAL from a non-final order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed and cause remanded.*

SULLIVAN, J. Lasando L. R. appeals from a non-final order<sup>1</sup> denying his motion to dismiss a delinquency petition charging him with one count of armed robbery, and one count of attempted armed robbery. He

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<sup>1</sup> By amended order of December 12, 1994, this court granted Lasando L. R.'s petition for leave to appeal the non-final order.

presents this court with one issue for review: whether the Double Jeopardy Clause of the United States Constitution and Article I, Section 8 of the Wisconsin Constitution bar his retrial on the delinquency petition. We affirm.<sup>2</sup>

The State filed a delinquency petition charging Lasando with committing an armed robbery and attempted armed robbery. Lasando filed a discovery request for all statements made by Lasando concerning the offenses that were in the possession of the State or its agents. A jury trial was set, but then delayed when Lasando failed to appear for his trial. He was later apprehended and the case proceeded to trial.

During his trial, a police detective and the assistant district attorney mentioned a statement made by Lasando, of which his counsel had never received a copy during discovery. Lasando moved for dismissal for the discovery violation or, in the alternative, for a mistrial. The juvenile court granted the mistrial. Lasando then moved to dismiss the delinquency petition on, *inter alia*, double jeopardy grounds. The juvenile court, after a hearing in which both the detective and assistant district attorney testified, denied the motion, finding that it was not the "subjective intent of the prosecutor ... to goad the defense into a mistrial request." Lasando appeals from the non-final order denying his motion.

Generally, a mistrial ordered on a defendant's motion does not bar retrial under double jeopardy principles. *State v. Quinn*, 169 Wis.2d 620, 624, 486 N.W.2d 542, 543 (Ct. App. 1992). Double jeopardy may bar a second trial if the defendant petitions for mistrial on the basis of "prosecutorial overreaching" and the following two elements are met:

"(1) The prosecutor's action must be intentional in the sense of a culpable state of mind in the nature of an awareness that his activity would be prejudicial to the defendant; *and* (2) the prosecutor's action was designed either to create another chance to convict, that is, to provoke a mistrial in order to get another

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<sup>2</sup> This appeal is decided by one judge, pursuant to § 752.31(2)(e), STATS.

`kick at the cat' because the first trial is going badly, or to prejudice the defendant's rights to successfully complete the criminal confrontation at the first trial, *i.e.*, to harass him by successive prosecutions.”

*Id.* at 624, 486 N.W.2d at 543-44 (citation omitted; emphasis in original); *see also Oregon v. Kennedy*, 456 U.S. 667, 670-76 (1982).

Examining the prosecutor's intent involves a factual finding on the part of the juvenile court. *Quinn*, 169 Wis.2d at 626, 486 N.W.2d at 544; *see Kennedy*, 456 U.S. at 675. We will not overturn a juvenile court's finding of fact unless it is clearly erroneous. Section 805.17(2), STATS.

In this case, the juvenile court found that it was not the “subjective intent of the prosecutor ... to goad the defense into a mistrial request.” This finding is not clearly erroneous. The State opposed the mistrial and, according to the juvenile court, the assistant district attorney was “absolutely devastated” when the mistrial was granted. Further, the court stated that there was nothing either in the way the trial was progressing, or in the make-up of the jury that suggested that the State would “wish” to retry the case again in front of another jury. Lasando presents this court with nothing from which we can conclude that the juvenile court's finding of fact on this issue was clearly erroneous. Accordingly, we affirm the non-final order denying Lasando's motion to dismiss the delinquency petition. The matter is remanded to the juvenile court for further proceedings.

*By the Court.*—Order affirmed and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.